APPENDIX

APPENDIX A

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

CASIMIR STASZCUK,

Defendant-Appellant.

No. 73-869

United States Court of Appeals, Seventh Circuit

Argued April 4, 1974.

Decided Sept. 10, 1974.

Rehearing En Banc Granted

Dec. 23, 1974.

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Before PELL and SPRECHER, *Circuit Judges,* and CAMPBELL, *Senior District Judge.*

SPRECHER, *Circuit Judge.*

In 1967 defendant was elected alderman from the 13th ward in the City of Chicago. According to the evidence viewed in a light most favorable to the government, defendant accepted three payments of $3,000 each from a "zoning consultant," Al C. Allen. Allen testified he made the payments on behalf of his clients in return for defendant's agreement not to oppose their applications for zoning amendments relating to three pieces of property in the 13th ward.

Defendant was convicted by a jury on three counts of Hobbs Act violations,[1] four counts of mail fraud,[2] and

[1] 18 U.S.C. § 1951(a): "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so . . . shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

[2] 18 U.S.C. § 1341: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or

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two counts of filing false income tax returns.[3] He was sentenced to nine concurrent sentences of eighteen months each.

I. *Hobbs Act Counts*

The indictment charged defendant with obstructing, delaying and affecting commerce "by means of extortion," in that he "obtained property not due either him or his office . . . with [Allen's] consent being induced under color of official right." The indictment specified that Allen feared he would be unable to procure the zoning changes "unless he compensated defendant to refrain from objecting to such . . . change[s] as a member of the Chicago City Council. . . ."

Apparently this is one of the first prosecutions under section 1951 to rely solely on subsection b(2)'s definition of extortion as "the obtaining of property from another, with his consent, induced . . . under color of official right."[4]

(footnote continued)
property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

[3] 26 U.S.C. § 7206(1).

[4] Another such case is pending on appeal in this court. United States v. Braasch, Nos. 74-1000-1017 and 74-1105.

All reported Hobbs Act cases charging extortion relied on the "wrongful use of actual or threatened force, violence, or fear" section of the definition. The only exception is United States v. Kenny, 462 F.2d 1205 (3d Cir.), cert. denied, 409 U.S. 914, 93 S.Ct. 233, 34 L.Ed.2d 176 (1972), in which defendants were charged with extortion through wrongful use of fear *or* under color of official right.

Defendant concedes, as we believe he must,[5] that under the Hobbs Act "color of official right" may replace the coercion of "force, violence, or fear."

Defendant argues, rather, that his acceptance of three $3,000 payments for not opposing the zoning changes was not under color of official right because it was not related to his official functions. An alderman need not oppose or favor a particular zoning application, and defendant offered some evidence that the City Council does not always act consistent with an alderman's position on a zoning change in his ward. His only authorities for this proposition are People v. Samuels, 188 Misc. 607, 71 N.Y.S.2d 562 1947), and Collier v. State, 55 Ala. 125 (1876). In *Samuels* a tax collector was charged with extortion for accepting a fee to "straighten out" a claim which he had

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[5] *See* United States v. Kenny, 462 F.2d 1205, 1229 (3d Cir.), cert. denied, 409 U.S. 914, 93 S.Ct. 233, 34 L.Ed.2d 176 (1972), in which the court approved submission of the case to the jury under instructions allowing conviction for extortion through fear or under color of official right. *See also* Chief Judge Swygert's concurrence in United States v. DeMet, 486 F.2d 816, 822-823 (7th Cir. 1973), cert denied, 416 U.S. 969, 94 S.Ct. 1991, 40 L.Ed.2d 558 (1974); United States v. Sutter, 160 F.2d 754, 756 (7th Cir. 1947); and Stern, Prosecution of Local Political Corruption under the Hobbs Act, 3 Seton Hall L.Rev. 1 (Fall 1971), written by the prosecutor of the *Kenny* case.

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no power to settle, compromise or influence. The court held that the statute covered only situations where the service provided by the official was within the scope of his public employment. In *Collier* a county attorney accepted fees for giving professional advice as a private attorney. The court held he may have accepted money under false pretenses, but since the fees did not relate to his official function he had not committed extortion.

The government presented sufficient evidence of an alderman's influence [6] over zoning applications in his own ward that the jury could conclude defendant's official functions encompassed the unbiased consideration and treatment of all zoning applications. The payments were made to defendant to influence his exercise of the political power he held as alderman over zoning applications. To accept money in return for an agreement not to oppose such applications—in effect to suspend independent judgment on the merits of such zoning changes—constitutes obtaining property from another, with his consent, induced under color of official right. The evidence supports defendant's convictions for extortion.

Conviction under the Hobbs Act, however, requires proof that the extortion had at least an arguably *de minimus* effect on interstate commerce. United States v. DeMet, 486 F.2d 816 (7th Cir. 1973), cert. denied, 416 U.S. 969, 94 S.Ct. 1991, 40 L.Ed.2d 558 (1974). To satisfy this jurisdictional element of the crime, the government presented evidence that on the rezoned properties in counts I and II were built apartment buildings that could not have been constructed under the previous zoning. Certain materials used in the construction of these buildings were

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[6] And of Allen's impression of an alderman's influence. *Cf.* United States v. Varlack, 225 F.2d 665 (2d Cir. 1955).

shipped in interstate commerce. Because the rezoning, procured through extortion, created a demand for construction materials to be shipped into Illinois, the effect on interstate commerce [7] in counts I and II was direct and demonstrable.[8]

The property in count III had to be rezoned to permit construction of an animal hospital. Once the zoning change was made, however, the veterinarian for whom the hospital was to be built backed out of the deal. The owner instead erected buildings which were proper under the previous zoning. To show the rezoning's effect on interstate commerce under count III, the government presented the testimony of one of three potential contractors, who said his company would have used materials from interstate commerce if it had been awarded the contract to construct the animal hospital.

The government cites several cases for the proposition that any *potential* effect on commerce satisfies the Hobbs Act. In United States v. Pranno, 385 F.2d 387 (7th Cir.

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[7] There are no cases definitively holding that the effect on commerce either must be or need not be an adverse effect. But surely the word "affects" in the phrase "obstructs, delays, or affects" is superfluous if it is interpreted to mean "affects adversely."

[8] United States v. Pranno, 385 F.2d 387 (7th Cir. 1967), cert denied, 390 U.S. 944, 88 S.Ct. 1028, 19 L.Ed.2d 1132 and 972, 88 S.Ct. 1094, 19 L.Ed.2d 1183 (1968); United States v. Kramer, 355 F.2d 891 (7th Cir. 1966); Anderson v. United States, 262 F.2d 764 (8th Cir.), cert. denied, 360 U.S. 929, 79 S.Ct. 1446, 3 L.Ed.2d 1543 (1959); Hulahan v. United States, 214 F.2d 441 (8th Cir.), cert. denied, 348 U.S. 856, 75 S.Ct. 81, 99 L.Ed. 675 (1954).

Since the extortion directly facilitated the flow of building materials in interstate commerce, we need not depend on a "depletion of assets" theory to show an effect on commerce. Thus we need not decide whether Allen or his clients were the victims of the extortion, or whose assets were depleted.

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1967), cert. denied, 390 U.S. 944, 88 S.Ct. 1028, 19 L.Ed.2d 1132 and 390 U.S. 972, 88 S.Ct. 1094, 19 L.Ed.2d 1183 (1968), there was no delay in construction because the extortion money was paid and the building permit issued. The court upheld the Hobbs Act convictions because "it was only necessary to prove that delay would have been caused had the owner and contractor refused payment and defendants carried out their threat to withhold the permit." 385 F.2d at 390. But here the result of the extortion payment was exactly the same as if no extortion or rezoning had occurred: no shipment of materials in interstate commerce.

The court in United States v. Hyde, 448 F.2d 815, 836 (5th Cir. 1971), cert. denied, 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745 (1972), made the point that there is no requirement "the company be engaged in an interstate transaction at the moment of the extortion to support federal jurisdiction." But the victim companies did participate in interstate activities within a year of the payoffs which permitted them to stay in business.

The victim in United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969), cert. denied, 397 U.S. 1021, 90 S.Ct. 1258, 25 L.Ed.2d 530 (1970), purchased trucks from an out-of-state corporation. By surrendering his right to solicit additional customers in response to extortionate threats by a competitor, the victim "automatically limited his future orders" for the trucks.[9] The owner of the count III property, however, was not engaged in interstate commerce at the time of the extortion; the rezoning did not

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[9] United States v. Augello, 451 F.2d 1167 (2d Cir. 1971), cert. denied, 405 U.S. 1070, 92 S.Ct. 1518, 31 L.Ed.2d 802 (1972), is a similar case.

promote any future interstate activities because he never built the animal hospital.

We agree that the effect of the extortion on commerce does not have to be simultaneous with the extortion. Indeed, it followed the extortion by some months in counts I and II. But when the effect never materializes—despite the failure or success of the extortion—the commerce element of the Hobbs Act is not established.[10] *Cf.* United States v. Critchley, 353 F.2d 358 (3d Cir. 1965).

The convictions on counts I and II are affirmed; the conviction on count III is reversed.

II. *Mail Fraud Counts*

Applications for zoning changes are introduced before the City Council and referred to the Committee on Buildings and Zoning. The committee sets a date for a public hearing and sends form notices to occupants of buildings within 150 feet of the subject property.[11] Four such notices are the mailings charged in the four mail fraud counts. Defendant argues that the committee's mailing of these notices was not in furtherance of his scheme to defraud.

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[10] The government argues we must accept any potential effect of extortion as satisfying the Hobbs Act, or eliminate the offense of attempted extortion under section 1951, since the only effect of an attempt must be a potential effect. This is a frivolous argument, since the government can prove what the result of an extortion attempt would have been if the extortion had been successful. If the extortion is successful and there is still no effect on commerce, the extortioner has not violated the Hobbs Act.

[11] It is not clear from the record whether the committee is required by law to send these notices or does so as a courtesy to affected persons.

We begin with the proposition that "statutes such as section 1341 should be carefully and strictly construed in order to avoid extension beyond the limits intended by Congress." United States v. Kelem, 416 F.2d 346, 347 (9th Cir. 1969), cert. denied, 397 U.S. 952, 90 S.Ct. 977, 25 L.Ed. 2d 134 (1970). To support federal criminal jurisdiction, the mailing must be, in the words of the statute, "for the purpose of executing such scheme or artifice." The connection between the fraud and the use of the mails "must be real and proximate, not merely abstract or remote." United States v. Brickey, 296 F.Supp. 742, 748 (E.D.Ark. 1969).

The requisite connection was established in Pereira v. United States, 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed. 435 (1954), where the victim used the mails to procure the cash she turned over to defendants. A letter or inquiry in response to a newspaper advertisement satisfied the statutory requirement in United States v. Hopkins, 357 F.2d 14 (6th Cir.), cert. denied, 385 U.S. 858, 87 S.Ct. 107, 17 L.Ed.2d 84 (1966). And the mailing of an I.R.S. interest-payment notice to legitimize a fictitious loan was considered integral to the pretense in United States v. Isaacs, 493 F.2d 1124, 1151 (7th Cir.), cert. denied, 417 U.S. 976, 94 S.Ct. 3184, 41 L.Ed.2d 1146 (1974).

But a use of the mails that is not a step toward receipt of the fruits of the scheme is not covered by section 1341. United States v. Maze, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed. 2d 603 (1974); Kann v. United States, 323 U.S. 88, 65 S. Ct. 148, 89 L.Ed. 88 (1944); Henderson v. United States, 425 F.2d 134 (5th Cir. 1970); Richardson v. United States, 150 F.2d 58 (6th Cir. 1945). In *Maze* the Supreme Court held a perpetrator of a classic credit-card swindle could not be prosecuted under section 1341. The delay in transmitting invoices was caused by distance rather than by the

mail service itself. Since the defendant would have preferred that the invoices never be mailed, the mailings could hardly be said to further his scheme.

With these precedents in mind, let us examine the role of the committee's notices of public hearings in defendant's scheme. The purpose of the notices was to provide an opportunity for affected persons to state objections to the proposed zoning changes. Yet Allen's testimony and the timing of the payments after committee approval was assured, imply that the zoning amendments had to go through before defendant would be paid. As in *Maze,* the purpose of the mailings conflicted with, rather than promoted, defendant's scheme to defraud.

In actual fact, the notices had little effect on the procedure of passing the amendments. They produced no witnesses at the Schaefer and Prokop-Zabrodski hearings.[12] One witness at the Harris hearing had received a notice. Two other witnesses identified themselves as adjacent owners, but their addresses were not on the notice list. All three objected to the zoning change.[13]

From either a theoretical or a factual point of view, the committee's mailing of notices seems too remote from defendant's scheme to support a conviction under section 1341.

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[12] There was one witness at the Schaefer hearing who was not on the notice list but who asked for an opportunity to talk with area residents before the committee passed on the amendment. He said that, based on what he had learned at the hearing, "I don't believe we would have any objection. . . ." (Gvn't Ex. 1-6.)

[13] These witnesses and the attorney representing Harris all believed Harris wanted a zoning amendment to operate a pillow factory, while the record shows Harris, Allen and defendant knew the amendment was necessary for construction of an animal hospital.

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The government has three theories to truncate the remote connection between the mailings and defendant's scheme. The first is that the mailings would not have occurred if defendant had not agreed to support the amendments. This "but for" argument may show defendant "caused" the mailings, but is irrelevant to the purpose of the mailings.

The second theory is that the mailings contained misrepresentations. *See* United States v. Smothers, 435 F.2d 209 (7th Cir. 1970), cert. denied, 403 U.S. 906, 91 S.Ct. 2208, 29 L.Ed.2d 681 (1971); United States v. Williams, 424 F.2d 344 (5th Cir. 1970). These cases involved false bills of lading and fraudulent and misleading corporate reports. The government says the "latent" misrepresentation in the public-hearing notices is the impression that the committee will objectively consider the recipient's objections, when in fact the payoff to defendant has made the public hearing a sham.

Because the notices contained no false information as such, they are not in the same category as the mailings in *Smothers* and *Williams*. They are much more like the mailings in Parr v. United States, 363 U.S. 370, 80 S.Ct. 1171, 4 L.E.2d 1277 (1960), and United States v. Brickey, 296 F.Supp. 742 (E.D.Ark. 1969), In *Parr,* school trustees mailed legitimate tax bills and receipts with the intention of misappropriating part of the collections. The Supreme Court held the mailings did not contain misrepresentations. In *Brickey* the mailings were routine letters among an insurance company, its independent agencies and its insureds. The government argued that, by allowing company routine to continue, its president was committing fraud because he knew the company was about to become insolvent through his own looting. The court held the

mailings were not fraudulent in themselves, were not misrepresentations of solvency under the circumstances and could not support a prosecution under section 1341.

The government's third theory is that the public-hearing notices "lulled" nearby residents, the most direct victims, into believing their due process rights were being respected when actually they had been subverted by defendant's scheme. The only cases that have accepted "lulling" letters to support mail fraud convictions have been instances of reassurances that were integral parts of the schemes in allowing the perpetrators to continue profitable relationships with their victims. United States v. Sampson, 371 U.S. 75, 83 S.Ct. 173, 9 L.Ed.2d 136 (1962); United States v. Goldberg, 401 F.2d 644 (2d Cir. 1968), cert. denied, 393 U.S. 1099, 89 S.Ct. 895, 21 L.Ed. 2d 790 (1969). Where, as here, the mailings are not used to conceal and continue a fraud, the "lulling" theory has been rejected. United States v. Maze, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974); Kann v. United States, 323 U.S. 88, 65 S.Ct. 148, 89 L.Ed. 88 (1944); Henderson v. United States, 425 F.2d 134 (5th Cir. 1970).

We conclude that section 1341 does not encompass defendant's scheme to defraud because the mailings were not made in furtherance of that scheme. The convictions on counts IV, V, VI and VII must be reversed.

III. *Voir Dire*

Defendant claims the district court erred in refusing to ask several questions of prospective jurors. These questions were proposed by defendant not to establish grounds for challenges for cause, but to provide guidance in the exercise of peremptory challenges.

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[12] The first question was whether any of the panel had previously served on a jury. The district judge has the necessary discretion to decide whether to ask this question. United States v. Ruggiero, 472 F.2d 599 (2d Cir.), cert. denied, 412 U.S. 939, 93 S.Ct. 2772, 37 L.Ed.2d 398 (1973).

[13, 14] The second group of questions requested by defendant was designed to elicit more information about the prospective jurors' personal, social and associational backgrounds than the district judge's questions produced. After reading the transcript of the voir dire, we are satisfied that the background information obtained by the judge and by additional questioning by defendant reached the "happy mesne point" that provided "some basis for a reasonably knowledgeable exercise of the right to challenge." United States v. Lewin, 467 F.2d 1132, 1137 (7th Cir. 1972). We do not approve the judge's refusal to ask male jurors about their marital status and their spouse's occupations while asking female jurors the same questions, but such refusal does not rise to the level of reversible error.

[15] The next refused question was whether the prospective juror or his family member or close friend had ever applied for a job with the federal government. Defendant's argument is that an unsuccessful application would prejudice the venireperson against public officials in general. We do not accept this theory and believe the proposed question was irrelevant to the case.

[16, 17] The final unasked question was whether the prospective juror had ever taken a position with respect to any zoning change. The judge had already asked the panel whether they had ever tried to change the zoning

on property they owned and had explained the nature of the charges against defendant. There is no requirement that a matter "be explored in numerous substantially similar questions, with tedious repetitions, of only slightly variant shadings of meaning." United States v. Lewin, 467 F.2d 1132, 1138 (7th Cir. 1972). The panel was adequately alerted to this possible area of prejudice.

Lewin and United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970, 93 S.Ct. 1443, 35 L.Ed.2d 706 (1973), are two recent cases from this circuit finding error in the restriction of questioning on voir dire. In *Lewin* the two main witnesses were employees of the Better Government Association and the *Chicago Daily News*. The panel should have been asked whether they contributed to the BGA or were employed by either organization. In *Dellinger* the court refused to inquire into three areas in which conventional jurors were likely to be prejudiced against the unconventional defendants. Neither case provides a parallel for the thorough, detailed voir dire in the present case.

We wish to note our concurrence in Judge Campbell's concurring opinion.

The convictions on counts I, II, VIII and IX are affirmed.[14] The convictions on counts III, IV, V, VI and VII are reversed.

William J. Campbell, Senior District Judge (concurring).

I concur fully in Judge Sprecher's excellent opinion, and wish only to briefly state my own views with respect to defendant's contention that his actions constituted no more than the acceptance of a bribe, and that his conduct

[14] Counts VIII and IX, for filing false income tax returns, were not challenged on appeal except under the voir dire argument.

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was therefore not extortionate in character. The government need not demonstrate that a defendant, charged with extortion under color of official right, has obtained the property of another through the use of force, duress, fear or the threat of same. The evidence need only demonstrate that the public official has obtained from the "victim" something of value to which the official is not entitled, in return for something that should have been provided without payment. The office held by the official provides the coercive impetus which generates the pay ment.

In the instant case, the alderman's duties included the objective and unbiased evaluation of applications for zoning variances. Staszcuk was paid money by virtue of his office as alderman so that the powers of that office would not be misused to the detriment of the payor, or at a minimum, to insure that the zoning application would receive the fair and unbiased consideration which it should have been afforded without the encouragement of additional compensation. Thus, the office provided the duress which rendered the acceptance of money by Staszcuk extortion under color of official right.

That is not to say, however, that, as the government contends in the instant case, there is no distinction between the acceptance of a bribe by a public official and extortion under color of official right. For example, assume that a public official has been paid a sum of money to induce him to use his position and influence to obtain a building permit on behalf of an applicant who is clearly not entitled under the law to such a permit. In such a case, the money which the public official receives is not being paid to prevent the coercive use of his office, but rather to assist the payor in his efforts to obtain something to which he is

not lawfully entitled. As the court stated in United States v. Pranno, 385 F.2d 387, 390 (7th Cir. 1967) "it might be solely a bribe and not extortion if the record showed that the issuance of the permit was illegal. . . ."

Finally, contrary to the defendant's contention in the instant case, bribery and extortion are not necessarily mutually exclusive offenses. *Pranno, supra* at 390. A single payment may be made for more than one purpose, particularly where there exists some question regarding whether the payor is legally entitled to that for which he tenders payment. Where such is the case, the government need only prove the extortionate element of the transaction to support a charge of extortion under color of official right.

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APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

CASIMIR STASZCUK,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois,
Eastern Division
No. 73 CR 249
Richard B. Austin, *Judge.*

Argued en Banc February 18, 1975—Decided May 16, 1975

Before FAIRCHILD, *Chief Judge,* SWYGERT, CUMMINGS, PELL, STEVENS, SPRECHER, TONE and BAUER, *Circuit Judges.*

STEVENS, *Circuit Judge.* Count III of the indictment[1] charged that on December 8, 1970, appellant did obstruct,

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[1] The disposition of the remaining counts is explained in the panel opinion reported at 502 F.2d 875.

delay and affect commerce as defined in the Hobbs Act[2] by extorting $3,000 from a person named Allen.[3] The

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[2] Act of July 3, 1946, c. 537, 60 Stat. 420. The statute as codified in 18 U.S.C. § 1951, provides in pertinent part:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

* * *

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means . . . all . . . commerce over which the United States has jurisdiction."

[3] The charging paragraph in Count III of the indictment reads as follows:

"On or about December 8, 1970, at Chicago, in the Northern District of Illinois, Eastern Division,

CASIMIR STASZCUK,

the defendant, knowingly, wilfully and unlawfully did obstruct, delay and affect commerce, as defined by Section 1951(b)(3) of Title 18 of the United States Code, by means of extortion. More specifically, defendant, a public official, obtained property not due either him or his office, in the form of $3,000, paid partly by check and partly by cash, from Al C. Allen, with his consent being induced under color of official right. This payment was made because Allen believed and feared that he would be unable to procure a zoning change on property located on Pulaski Road betwen 56th Place and 57th Street, in the Thirteenth Ward of Chicago, unless he compensated defendant to refrain from objecting to such a change as a member of the Chicago City Council;

"In violation of Title 18, United States Code, Section 1951."

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government proved that defendant received the $3,000 and that he did not oppose a subsequent zoning change authorizing the construction of an animal hospital. However, no such hospital was ever built. Therefore, there is no evidence that either the zoning change or the payment had any effect whatsoever, either favorable or unfavorable, on interstate commerce. The question presented is whether the federal statute reaches this extortion.

The question is novel and significant. The extraordinary growth of federal criminal litigation poses a serious threat to the quality of federal justice; moreover, this growth may not only reflect but also contribute to the continuing transfer of power from the several states to the national government. Since we have no desire to accelerate this trend unnecessarily, we approach the question with a special regard for appellant's claim that the federal prosecutor has overreached the proper limits of his jurisdiction. The importance of the issue merited the fresh consideration of the court sitting en banc. It should be decided neither by simple extrapolation from the precedents on which the government relies nor by merely distinguishing the cases which have not yet carried us this far.

We first restate the essential facts and then explain why we believe that a fair consideration of the statutory purpose and its constitutional predicate require that the district court judgment be affirmed.

I.

In September, 1970, William Harris planned to build an animal hospital on property located in the 13th ward of the City of Chicago. As then zoned, such a use of the

land was prohibited. Harris therefore paid $5,500 to Al C. Allen, who had acquired a reputation as "the zoning man";[4] Allen talked to defendant Staszcuk, who was then serving as alderman of the 13th ward; on September 15, 1970 an amendatory ordinance was introduced in the City Council.

On December 8, 1970, the zoning man paid the alderman $3,000. On that date the alderman participated in the public hearing on the proposed ordinance, questioning objectors and, at least implicitly, supporting the proposal. Following the public hearing on December 8, pursuant to customary procedure, the zoning committee deferred action on the matter. A few weeks later, on January 27, 1971, the ordinance was approved by the committee and adopted by the City Council. Harris was thereafter free to construct his animal hospital.

In March, Harris received bids from three contractors. For reasons not explained in the record, however, the veterinarian apparently changed his plans and the hospital was never built. Instead, Harris improved his property with construction that would have been permitted before the zoning ordinance was amended.

The estimator for one of the three contractors testified that in his judgment construction of the animal hospital would have required the use of components manufac-

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[4] The witness Prokop referred to Allen as "the zoning man." (Tr. 174) When asked to explain how she heard about Allen, she stated that she had read about him in the papers and she went in to see him "because he was always zoning." (Tr. 177)

tured outside of the State of Illinois.[5] Neither of the other bidders testified. The nexus between the extortion and interstate commerce may therefore be described thusly: the extortion eliminated the alderman's possible opposition to the removal of a restriction which prevented Harris from building the hospital; if Harris had not changed his plans, the construction of the hospital would have involved the use of out-of-state materials. The jury found this nexus sufficient under the trial court's instructions on the commerce issue.[6] A panel of this court originally concluded that it was too tenuous and reversed the conviction on Count III. After reargument and reconsideration we now affirm that conviction.

II.

The present form of the statute is a codification of a 1946 enactment, the Hobbs Act, which amended the so-

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[5] Specifically, the contractor whose estimator testified would have used cast iron plumbing fixtures, plate glass, electrical fixtures, and a furnace manufactured elsewhere. Since the witness's testimony was predicated on his company's experience in the construction of four comparable animal hospitals in the preceding five years and his general knowledge of the industry, and since he was not aware of any Illinois sources for these items, the jury could fairly infer from the testimony that the other contractors would also have found it necessary to use components manufactured outside of Illinois.

[6] After explaining the meaning of "extortion under color of official right," the trial judge stated:

> "It is not necessary for you to find that the defendant Staszcuk knew or intended that his actions would affect, delay or obstruct commerce or the movement of any article in commerce; it is only necessary that the natural effect of the act committed by him, whether he was conscious of it or not, would be to affect, delay or obstruct commerce." (Tr. 585-586)

called "Federal Anti-racketeering Act of 1934."[7] The 1946 amendment was intended to encompass the conduct held to be beyond the reach of the 1934 Act by the Supreme Court in *United States* v. *Local 807*, 315 U.S. 521.[8] It was a broadening amendment concerned primarily with the proper differentiation between "legitimate" labor activity and labor "racketeering." It is, therefore, appropriate to consider the legislative purpose in enacting the 1934 Act in addressing the issue presented by this case.

That purpose was described in Judge Learned Hand's opinion for the majority of the Circuit Court of Appeals in the *Local 807* case as follows:

> In conclusion we may add that a consideration of the evil at which Congress was aiming, seems to us to confirm the construction we are putting upon what it said. For a number of years before 1934—at least in the City of New York—the levy of blackmail upon industry, especially upon relatively small shops, had become very serious, and the local authorities either would not, or could not, check it. The courts were powerless, because the witnesses were terrorized and could not be protected if they told what they knew; the public felt themselves at the mercy of organized gangs of bandits and became much wrought up over the situation. It was, at least primarily, to check such Camorras that Congress passed this measure.

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[7] The original statute is found at 48 Stat. 979-980, the 1946 amendment at 60 Stat. 420, and the 1948 codification at 18 U.S.C. § 1951.

[8] That case involved the construction of the exemption for "the payment of wages by a bona fide employer to a bona fide employee," which is no longer a part of the statute.

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United States v. *Local 807*, 118 F.2d 684, 687-688 (2d Cir. 1941).

A description of the statute as designed to eliminate the "levy of blackmail upon industry, especially upon relatively small shops," casts a revelatory light on the problem presented by this case. An effective prohibition against blackmail must be broad enough to include the case in which the tribute is paid [9] as well as the one in which a victim is harmed for refusing to submit. Since the payment would normally enable the business to continue without interruption, [10] the inference is inescapable

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[9] Counts I and II of this case; and *Stirone* v. *United States*, 361 U.S. 212; *Nick* v. *United States*, 122 F.2d 660 (8th Cir. 1941), *cert. denied*, 314 U.S. 687; *Hulahan* v. *United States*, 214 F.2d 441 (8th Cir. 1954), *cert. denied*, 348 U.S. 856; *United States* v. *Floyd*, 228 F.2d 913 (7th Cir. 1956), *cert. denied*, 351 U.S. 938; *United States* v. *Pranno*, 385 F.2d 387 (7th Cir. 1967), *cert. denied*, 390 U.S. 944; and *United States* v. *Hyde*, 448 F.2d 815 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058, are examples of such cases. Speaking for our court in *Pranno*, Judge Fairchild stated:

> "The statute seems to be read as not only prohibiting the obstruction of commerce by extortion, but also prohibiting extortion by any threat, *the carrying out of which would obstruct commerce*. We have no doubt of its coverage here." 385 F.2d at 389 (Emphasis added.)

[10] Of course, the payment of the extortion demand may, in some cases, have a direct actual effect on interstate commerce by reducing the assets available for the purchase of goods originating in other states. *See, e.g., United States* v. *Gill*, 490 F.2d 233 (7th Cir. 1973), *cert. denied*, 417 U.S. 968; *United States* v. *DeMet*, 486 F.2d 816 (7th Cir. 1973), *cert. denied*, 416 U.S. 969; and *United States* v. Augello, 451 F.2d 1167 (2d Cir. 1971), *cert. denied*, 405 U.S. 1070. In this case, however, the government does not contend that the $3,000 payment so depleted the resources of either Allen or Harris.

that Congress was as much concerned with the threatened impact of the prohibited conduct as with its actual effect.

Moreover, congressional concern was not merely a matter of providing federal protection to each of the "relatively small shops" being victimized, but rather reflected the legislative judgment that these entrepreneurs, in the aggregate, represented a component of industry of sufficient importance to merit federal protection. The concern which gave rise to the statute is marketwide. Thus, although enforcement necessarily proceeds on a case-by-case basis, our evaluation of both the intent of Congress and its power to implement that intent, requires more than a consideration of the consequences of the particular transaction disclosed by this record; it requires an identification of the consequences of the class of transactions of which this is but one example.[11]

The statute is not regulatory in character but instead is intended to remove artificial restraints on the free flow of goods. The elimination of "blackmail upon industry" can have no inhibitory effect on interstate commerce; it can only facilitate the operation of a free economy. Like the Sherman Act, which is broadly directed against private regulation of the free market, and which has been construed as an exercise by Congress of "all the power it possessed" to prevent restraints on commercial competition, see *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 495, and *Atlantic Cleaners & Dyers* v. *United States,* 286 U.S. 427, 435, the purpose of the Hobbs Act parallels the central purpose of the Commerce Clause itself.

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[11] *Compare United States* v. *Walker,* 489 F.2d 1353, 1357 (7th Cir. 1973), *cert. denied,* 415 U.S. 982.

That central purpose was described in these words by Justice Rutledge:

> If any liberties may be held more basic than others, they are the great and indispensable democratic freedoms secured by the First Amendment. But it was not to assure them that the Constitution was framed and adopted. Only later were they added, by popular demand. It was rather to secure freedom of trade, to break down the barriers to its free flow, that the Annapolis Convention was called, only to adjourn with a view to Philadelphia. Thus the generating source of the Constitution lay in the rising volume of restraints upon commerce which the Confederation could not check. These were the proximate cause of our national existence down to today.
>
> As evils are wont to do, they dictated the character and scope of their own remedy. This lay specifically in the commerce clause. No prohibition of trade barriers as among the states could have been effective of its own force or by trade agreements. It had become apparent that such treaties were too difficult to negotiate and the process of securing them was too complex for this method to give the needed relief. Power adequate to make and enforce the prohibition was required. Hence, the necessity for creating an entirely new scheme of government.
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> * * *
>
> So by a stroke as bold as it proved successful, they founded a nation, although they had set out only to find a way to reduce trade restrictions. So also they solved the particular problem causative of their historic action, by introducing the commerce clause in the new structure of power.

W. Rutledge, A Declaration of Legal Faith, at 25-26 (1947).

The primary purpose of the Commerce Clause was to secure freedom of trade, to break down the barriers to its free flow, and to curtail the rising volume of restraints

upon commerce that the Articles of Confederation were inadequate to control. A statute which has a purpose which so unambiguously parallels the fundamental purpose of its constitutional predicate must receive an expansive construction.

It is, therefore, not surprising to find that the language of the statute, its legislative history, and its interpretation by the Supreme Court all confirm an intent by Congress to exercise its full powers under the Commerce Clause. The definition of the word "commerce" in the 1934 Act encompassed "all trade over which the United States has constitutional jurisdiction."[12] The Senate Report approvingly quoted a Department of Justice memorandum stating that the proposed statute was designed "to extend Federal jurisdiction over all restraints of any commerce within the scope of the Federal Government's constitutional powers." *See* S. Rep. No. 532, 73rd Cong., 2d Sess. at 1 (1934). And, as has often been noted, in *Stirone* v. *United States*, 361 U.S. 212, 215, the Supreme Court expressly stated that the broad language of the Hobbs Act manifests "a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence."

Against this background, we have no alternative but to conclude that Congress intended the Hobbs Act to apply to a case such as this and that it had ample power to effectuate that intent.

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[12] 48 Stat. 979. Moreover, in describnig the requisite effect on commerce, § 2 of the 1934 Act broadly referred to activity "in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce. . . ."

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III.

There was no need to prove that the extortion was actually intended to obstruct or to affect interstate commerce. The commerce element of the Hobbs Act violation is jurisdictional. Recently the Supreme Court removed such doubt as theretofore existed about the prosecutor's burden of proving "anti-federal scienter." *See United States* v. *Feola*, 43 U.S.L.W. 4404 (U.S. March 19, 1975).[13]

We are also persuaded that the cases which uniformly hold that a threatened effect on interstate commerce is sufficient to bring the statute into play notwithstanding the absence of any actual effect, correctly interpret the congressional purpose.[14] Finally, we have no doubt that the extortion revealed by this record is a species of the "blackmail upon industry" which Congress mustered its

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[13] Speaking of 18 U.S.C. §§ 111 and 371, the Court stated:

"The jurisdictional requirement is satisfied by the existence of facts tying the proscribed conduct to the area of federal concern delineated by the statute. Federal jurisdiction always exists where the substantive offense is committed in the manner therein described, that is, when a federal officer is attacked. Where, however, there is an unfulfilled agreement to assault, it must be established whether the agrement, standing alone, constituted a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction. If the agreement calls for an attack on an individual specifically identified, either by name or by some unique characteristic, as the putative buyers in the present case, and that specifically identified individual is in fact a federal officer, the agreement may be fairly characterized as one calling for an assault upon a federal officer, even though the parties were unaware of the victim's actual identity and even though they would not have agreed to the assault had they known that identity."

43 U.S.L.W. at 4411-4412.

[14] See the cases in n. 9, *supra*.

full power to eradicate. The muscle of the faithless public servant is just as intolerable as the muscle of the Camorras described by Judge Hand.[15]

This does not mean, however, that we may ignore the constitutional limits on the power of the national government. Nor may we disregard the statutory language which requires the prosecutor to prove some connection with interstate commerce in every case.[16] We hold, however, that the commerce element of a Hobbs Act violation —the federal jurisdictional fact—may be satisfied even if the record demonstrates that the extortion had no actual effect on commerce.[17] Congressional concern is justified

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[15] *Compare* Mr. Justice Clark's reference to "a betrayal of public trust of the most alarming type to a free society" in his opinion in *United States* v. *Braasch*, 505 F.2d 139, 141 (7th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3551 (April 15, 1975).

[16] The language of this statute does not permit us to treat it as a determination that since the class of activities giving rise to federal concern has an adverse effect on commerce, Congress intended any activity within the class to be subject to prosecution without the necessity of any showing of an actual or potential effect on commerce in the particular case. *Compare United States* v. *Hunter*, 475 F.2d 1019, 1020-1021 (7th Cir. 1973), *cert. denied*, 414 U.S. 857.

[17] The same conclusions apply to the Sherman Act. The federal interest in keeping the market free of artificial restraints justifies a prohibition against an agreement to fix prices even if the agreed price is reasonable, *see e.g., United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397-401, and even if the agreement may result in a lower price in the particular case. *See e.g., Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213. Undoubtedly the illegality would attach even if the defendants could demonstrate that the prevailing price would have been the same without any such agreement. The federal power to protect the free market may be exercised to punish conduct which threatens to impair competition even when no actual harm results. *Cf. United States* v. *Finis P. Ernest, Inc.*, 509 F.2d 1256 (7th Cir. 1975).

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by the harmful consequences of the class of transactions to which the individual extortion belongs, and jurisdiction in the particular case is satisfied by showing a realistic probability that an extortionate transaction will have some effect on interstate commerce.[18]

The jurisdictional inquiry must, of course, focus on the situation at the time of the offense. In this case the crime occurred on December 8, 1970. No actual effect on commerce occurred either before or after that date. It was, nevertheless, entirely reasonable for the jury, assessing probabilities as of that time, to find that a potential effect on commerce had been proved. The jury could reasonably infer that, as a result of the extortion on that date, there was then a likelihood that the movement across state lines of a furnace, plate glass, and plumbing and electrical fixtures would be affected. The events which occurred after December 8, 1970, the evidence concerning the interested parties' plans and expectations, and the contractor's testimony about the need to use out-of-state components to build an animal hospital in Illinois were all relevant to the commerce issue. Contrary to the prosecutor's view, however, we do not think appellant's guilt or innocence may be determined entirely on the basis of the intent of the property owner or the zoning man; nor, on the other hand, do we think federal jurisdiction is defeated by the fortuitous circumstance that, after the crime had been committed, a change of plans occurred and

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[18] The instruction in this case required the jury to find that the "natural effect" of the transaction would be to affect commerce. *See* n. 6, *supra*. We find no significant difference between that phrasing and a test phrased in terms of a "realistic probability" of such an effect.

the hospital was never built.[19] Finally, contrary to appellant's argument, even though it is possible that another contractor might have been able to construct the hospital entirely with local materials, the testimony was adequate to support the conclusion that the use of out-of-state components was far more probable. The jury, like Congress, was entitled to assess probabilities.

The jury was properly instructed on the commerce issue and its verdict is supported by the evidence. The conviction on Count III is affirmed.[20] For the reasons stated in the panel opinion of September 10, 1974, the convictions on Counts IV, V, VI, and VII are reversed and the convictions on Counts I, II, VIII and IX are affirmed.

SPRECHER, *Circuit Judge,* dissenting.

The court *en banc* has let stand the original panel decision affirming the convictions on Counts I, II, VIII and IX and reversing the convictions on Counts IV, V, VI and VII. *United States* v. *Staszcuk,* 502 F.2d 875 (7th Cir. 1974).

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[19] Nor would appellant have been any less culpable if for some unanticipated reason the ordinance had not in fact passed on January 27, 1971. Conversely, if on December 8, 1970, no effect on interstate commerce had been foreseeable, a subsequent decision creating an interstate nexus would not retroactively convert a possible state offense into a federal crime.

[20] At appellant's request we have again reviewed the transcript of the voir dire examination of prospective jurors. Although we adhere to our original conclusion that the entire examination brought out sufficient information about the seven male jurors (and one male alternate) who were accepted to enable experienced defense counsel to make a reasonably knowledgeable use of their peremptory challenges, we repeat our disapproval of the trial judge's refusal to inquire about the marital status of male jurors or to ascertain the employment status of their spouses.

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Count III, which the panel reversed, has now been affirmed by a majority of the *en banc* court. Inasmuch as the original opinion will retain viability in regard to eight counts, no purpose would be served by repeating the reasons stated therein for originally reversing Count III.

Therefore, I respectfully dissent from the *en banc* affirmance of Count III on the grounds set forth in 502 F.2d at 879 and would reverse that Count.

SWYGERT, *Circuit Judge,* dissenting.

I concur in Judge Sprecher's dissent. I also dissent from the court's opinion on another ground: the trial judge's handling of the voir dire examination of the prospective jurors.

Judge Stevens, writing for the majority, treats the matter in footnote 20 of his opinion. There he says that upon reviewing the record the court adheres to the original conclusion that the entire examination brought out sufficient information for peremptory challenge purposes, but that the court disapproves "the trial judge's refusal to inquire about the marital status of male jurors or to ascertain the employment status of their spouses." Although the court voices its disapproval, there is no consequence. Apparently the error is chalked up as harmless. This flaw in the examination, along with others I shall mention, was not harmless error in my opinion. Certainly enough has been said by this circuit to make clear to the trial bench the necessity of an adequate voir dire examination and the danger of truncated, hurried procedures which may mitigate against the selection of unbiased, qualified jurors. *United States* v. *Lewin,* 467 F.2d 1132 (7th Cir. 1972); *United States* v. *Dellinger,* 472 F. 2d 340 (7th Cir. 1972).

As we indicated in *United States* v. *Lewin* the voir dire examination should include questions that go beyond what may bring out information that could be the basis for a challenge for cause. It should also include questions relevant to the nature of the case and the indentity of the parties that might establish the basis for an informed, intelligent peremptory challenge. Otherwise, the right to exercise challenges peremptorily would be useless. As this court said in *United States* v. *Dellinger:* "[If] this right is not to be an empty one, the defendants must, upon request, be permitted sufficient inquiry into the background and attitudes of the jurors to enable them to exercise intelligently their peremptory challenges. . . ." 472 F.2d at 368.

With these pronouncements in mind, how can it be said that information that a prospective juror has previously served as a petit or grand juror in criminal matters is not relevant background for making a peremptory challenge decision. Yet the trial judge here refused to ask the relevant question. As the defendant argues, the failure of the jurors, upon being asked, to express any reason why they could not fairly and impartially try the case might not alert them to unperceived prejudice or bias that previous jury service may have created in their minds. *Cf. United States* v. *Martin*, 507 F.2d 428 (7th Cir. 1974).

Furthermore, the refusal of the trial judge to inquire about the length of residence of the jurors at their present addresses and about their residence immediately prior thereto deprived the defendant of relevant information concerning the social background of the jurors.

Finally, the trial judge did not ask a question concerning a highly relevant aspect of the jurors' possible experience with zoning matters. He did frame the following question to them:

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> Now we are going to see if we can find out whether any of you have ever had any property in which there was some discussion, or maybe more than a discussion, in regard to changing the zoning regulations in regard to this property, and again I see no hands raised, so I am assuming that none of you have ever had property where you had any desire to have the zoning changed.

But more should have been asked. Inquiry should have been made, as defendant requested, as to whether any of the jurors had ever resisted or taken a "position" with respect to any proposed zoning change. Some juror may have had experience, good or bad, with a zoning request that did not affect his real estate directly but did affect indirectly his interests either as an adjacent property owner or a nearby resident. Such information could have been the basis for a peremptory challenge.

A meaningful opportunity for the defendant to exercise his right to peremptory challenges was thus thwarted by the trial judge. The Government argues in its brief:

> In this case, as in all cases, the *voir dire* could have been more elaborate and penetrating. But if the overcrowded criminal docket in this jurisdiction is not to buckle under its own weight, a trial judge who, on the facts presented, does not impinge upon the essential demands of fairness must be accorded leeway in determining when the *voir dire* has produced a fair jury capable of just judgment.

In the first place there was an impingement upon the essential demands of fairness. Secondly, overcrowded criminal dockets are no excuse for such impingement. Given an overcrowded docket, other means could have been utilized to accommodate the need to save time and yet afford fairness. For example, a questionnaire, formulated at a pretrial conference, which would have covered most if not all the relevant questions, could have been furnished

the prospective jurors before they were called into the courtroom. Regardless of such suggested solutions, short-cut procedures, as here, do not comport with fair trials. I would reverse and remand for a new trial.

PELL, *Circuit Judge,* dissenting. Count Three of the indictment charged that Casimir Staszcuk "did obstruct, delay and affect commerce" . . . "by means of extortion" in violation of 18 U.S.C. §1951. The statute which was the basis of the indictment reads in pertinent part: "Whoever in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion. . . ." The evidence adduced by the Government at the trial showed affirmatively that Staszcuk did not obstruct, delay, or affect commerce by the transactions charged in Count Three. Nevertheless, he was convicted on this Count and now a majority of this court, although conceding that the Count Three activity had no effect whatsoever on interstate commerce, have affirmed the conviction. I respectfully dissent from the result reached and while concurring in the dissenting opinion of Judge Sprecher, because of what I regard as a substantially incorrect extension of federal jurisdiction into a localized crime, I feel impelled to add the following comments.

The net effect of the majority decision is to construe the statute to read: "Whoever in any way or degree potentially obstructs, delays, or affects commerce, even though he does not actually obstruct, delay, or affect commerce. . . ."

The majority despite its scholarly consideration of what it deems Congress probably intended as the scope of its exercise of constitutional power to regulate commerce, ignores that which Congress did in fact enact. In the recent case of *Burns* v. *Alcala,* No. 73-1708, 43 U.S.L.W. 4374, 4376 (March 18, 1975), the Supreme Court referred

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to the "axiom that words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary." The ordinary meanings of the jurisdictional words, "obstruct, delay, and affect," as detailed in dictionaries of the English language all appear to import the concept of accomplishment, a *fait accompli* rather than a *fait potentiel.*[1] I do not find persuasive reasons for ignoring the ordinary, the plain and explicit, meanings of these key words by equating the breach of trust of a public official which has no actual effect upon commerce and which does not delay or obstruct commerce, as reprehensible as that misconduct may be, with the widespread racketeering at which Congress intended to direct its enactment. I do not read the history quite as does the majority. It seems rather clear to me that Congress was not so much interested in removing artificial restraints on the free flow of goods as it was in striking down an evil which "had become very serious, and the local authorities either would not, or could not, check. . . ." *United States* v. *Local 807*, 118 F.2d 684, 687-688 (2d Cir. 1941). That the Hobbs Act which was aimed at a specific evil, is sufficiently broad to catch in its net other extortionists whose nefarious activities do in fact affect commerce does not signify to me an intention on the part of Congress, even if Congress has the constitutional power which is not at all clear, to extend the exercise of legislative power to local activities which have no effect whatsoever on interstate commerce. The determination of whether to prose-

[1] For example from Webster's Third International Dictionary: *affect*—"to produce an effect . . . to produce a material influence upon or alteration in"; *delay*—"to cause to be slower"; *obstruct*—"to block up . . . to be or come in the way of . . . to cut off from sight."

cute federally what is essentially a local crime when it has some minimal connection with interstate commerce is a matter of prosecutorial policy with which the courts do not ordinarily concern themselves. We are, however, not dealing with a question of prosecutorial policy but rather prosecutorial power which I deem to be lacking.

The portion of the statute which would reach nearest to the applicability point here is "affect commerce." That phrase is not a stranger to other legislation, thus, in the National Labor Relations Act we find the Board being empowered "to prevent any person from engaging in any unfair labor practice . . . affecting commerce." 29 U.S.C. §160(a).

The use of the word "affect" in the analogous NLRA situation and recognition that Congress intended to indicate the fullest employment of its commerce power authority is discussed in the *en banc* opinion in *National Labor Relations Board* v. *Suburban Lumber Co.*, 121 F.2d 829, 831-32 (3d Cir. 1941), *cert. denied*, 314 U.S. 693:

> "The National Labor Relations Act uses what have been described as words of art to indicate the fullest employment of this Congressional authority. The selection of the word "affect" is of recent origin. Although it appears in the language of some of the earlier Supreme Court opinions, it only found its way into relatively new legislation, and so is not present in such statutes as the Federal Trade Commission, the old Employers' Liability Act, and the Sherman Act. They qualify interstate commerce with such words as 'in', 'engage in' or 'restraint', whereas such modern statutes as the National Labor Relations Act, the Bituminous Coal Act, and the new Employers' Liability Act, prefer the more vehement 'affect'. That the word has the widest conceivable scope is apparent both from its dictionary definition and its judicial interpretation. The dictionary says: 'To act up-

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> on; produce an effect on; touch', and the cases are equally unanimous in emphasizing this inclusive character and so hold it to mean 'acting upon', 'working a change in' or 'concerning'." (Footnotes omitted.)

That there must be some effect on commerce even though small would appear to be the underlying premise of the Supreme Court's position on the National Labor Relations Act, and I am unaware of any basis for differentiating the Hobbs Act.

> "The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small. *Hanley* v. *Kansas City Southern Ry. Co., supra* [187 U.S. 617, 619] The exercise of Congressional power under the Sherman Act, the Clayton Act, the Federal Trade Commission Act, or the National Motor Vehicle Theft Act, has never been thought to be constitutionally restricted because in any particular case the volume of the commerce affected may be small. The amount of the commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication.
>
> "The language of the National Labor Relations Act seems to make it plain that Congress has set no restrictions upon the jurisdiction of the Board to be determined or fixed exclusively by reference to the volume of interstate commerce involved. Section 2(6) defines commerce as 'trade, traffic, commerce, transportation, or communication among the several States,' without reference to its volume, and declares in subsection (7) that .'The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.'

Section 10(a) confers on the Board authority 'to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.'

"The Act on its face thus evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce by the adoption of measures for the prevention or control of certain specified acts—unfair labor practices—which provoke or tend to provoke strikes or labor disturbances affecting interstate commerce. Given the other needful conditions, commerce may be affected in the same manner and to the same extent in proportion to its volume, whether it be great or small. Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim *de minimis.*" *National Labor Relations Board* v. *Fainblatt,* 306 U.S. 601, 606-607 (1939).[2]

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[2] The *de minimis* concept, which by definition would seem to require some effect and which would likewise appear to preclude a jurisdictional basis of no effect at all, was given consideration by this court in the case of *Community Currency Exchange, Inc.* v. *National Labor Relations Board,* 471 F.2d 9, 41-42 (7th Cir. 1972):

"It is true, however, as the company urges here, that the Board's broad jurisdiction is limited by the *de minimis* doctrine. The *de minimis* concept, as enunciated in *NLRB* v. *Fainblatt,* 306 U.S. 601 607, 59 S.Ct. 668, 83 L.Ed. 1014 (1939), operates to deny federal jurisdiction where a business's effect on commerce is so negligible that for jurisdictional purposes the enterprise is considered purely local. Although the concept is not susceptible to a mechanical application based upon a business volume formula, the Third Circuit has held that "*de minimus* in the law has always been taken to mean trifles—matters of few dollars or less." *NLRB* v. *Suburban Lumber Co.,* 121 F.2d 829, 832 (3d Cir. 1941). We adopted that reasoning in *NLRB* v. *Aurora City Lines, Inc.,* 299 F.2d 229, 231 (7th Cir. 1962). We do not deem the exchanges' effect on commerce trifling, either from the standpoint of dollar amount or business impact."

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Here the question is not great or small; it is, putting it very simply, some or none. In the language of *Fainblatt,* I can perceive no basis for inferring an intention of Congress to make the operation of the Hobbs Act independent of any effect whatsoever on interstate commerce. Since the ordinary meaning of the words used would indicate that Congress had no such intention, it is, of course, unnecessary to reach the constitutional question of whether Congress would have the power to reach beyond the boundary imposed by a complete lack of any commerce nexus.

The Government in arguing that potential effect on interstate commerce is sufficient relies on *United States* v. *Pranno,* 385 F.2d 387 (7th Cir. 1967), *cert. denied,* 390 U.S. 944; *United States* v. *Hyde,* 448 F.2d 815 (5th Cir. (1971), *cert. denied,* 404 U.S. 1058; *United States* v. *Tropiano,* 418 F.2d 1069 (2d Cir. 1969), *cert. denied,* 397 U.S. 1021 (1970); *Hulahan* v. *United States,* 214 F.2d 441 (8th Cir. 1954), *cert. denied,* 348 U.S. 856; and *United States* v. *Augello,* 451 F.2d 1167 (2d Cir. 1971), *cert. denied,* 405 U.S. 1070.

While language in these cases might suggest potential effect was sufficient, the language does not appear to have been necessary to the courts' holdings, although, of course, for the reasons I have indicated herein, to the extent that it was necessary to a holding I believe it incorrect. In *Pranno,* the defendants told the victim that a building permit would not be issued unless the victim paid them $20,000. Apparently some building material from other states had already been brought into Illinois at the time of the extortion. This court held that there was sufficient connec-

tion with interstate commerce. "Withholding the building permit would delay construction and the beginning of production. The interstate movement of building materials, raw materials, and finished goods would be correspondingly delayed. . . . The statute seems to be read as not only prohibiting the obstruction of commerce by extortion, but also prohibiting extortion by any threat, the carrying out of which would obstruct commerce." 385 F.2d at 389. The extortion money was paid so that the interstate movement of the goods, in fact, continued.

In *Hyde,* the defendants, including the Attorney General of Alabama, conspired to extort payments from life insurance companies and small loan companies. On appeal, the defendants argued that some of the companies were not engaged in interstate commerce at the time of the extortion. The Fifth Circuit held that the Hobbs Act nevertheless applied: "The companies were formed, and registration for a stock sale was sought, with a stated purpose of going into the activities that support a finding of interstate commerce. Neither the statute nor the Constitution requires that the company be engaged in an interstate transaction at the moment of the extortion to support federal jurisdiction." 484 F.2d at 836. All of the companies did eventually engage in interstate commerce.

In *Tropiano,* the defendants, who were engaged in the rubbish collection business, threatened other persons who were involved in the same business with violence if they did not stop soliciting business in the city in which the defendants operated. The victim eventually agreed not to solicit any of the defendants' customers or any further business in the city. At the time of the threats, the victim employed trucks and containers which were manufac-

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tured in another state. The Second Circuit held that there was sufficient connection with interstate commerce for the Hobbs Act: "[The victim's] surrender of his right to solicit additional customers in Milford automatically limited his future orders for receptacles for new customers and the trucks required to serve such customers." 418 F.2d at 1076.

In *Hulahan,* the defendant, a representative of a local labor union, attempted to extort and extorted money from three construction companies by threats of labor trouble. Two of the companies were dependent, for the continuation of the work undertaken by them, upon equipment, materials, and supplies from other states. The third company was working on the construction of runways at the St. Louis Municipal Airport. The Eighth Circuit held that there was sufficient connection with interstate commerce for the purposes of the Hobbs Act since the companies were dependent upon interstate commerce for materials, etc. or were engaged in construction facilities to serve interstate commerce.

In *Augello,* the Second Circuit held there was sufficient nexus with interstate commerce since the depletion of the victim's resources, due to the extortion payments, affected the victim's purchase of goods from interstate commerce. The evidence indicated that the victim purchased supplies from another state at the time of the extortion.

In sum, this court is squarely holding in a case, really of first impression, that the Hobbs Act has eliminated the necessity of actual effect on interstate commerce so long as it reasonably appeared at the time of the extor-

tion that there would be such effect. I cannot agree that Congress intended such an extension. [3]

Although I did approve of and concur in the opinion of the panel of this court when the case was first heard, since the matter has been before the court for reconsideration via the *en banc* route, I have reexamined the matter of the voir dire on the basis of the record and in the light of Judge Swygert's dissenting opinion. I am persuaded that the curtailment of sufficient opportunity to determine a proper basis for the selection of a jury was substantial enough to deny the appellant a fair trial. I therefore join in the dissent of Judge Swygert.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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[3] While perhaps not dispositive of the legal issue presented by Count Three, two collateral policy reasons suggest themselves for the view of the lack of necessity for straining to find that Congress did extend itself to the extent that the majority opinion finds it did.

(1) In a period of constant study of the problems presented by the overload of cases in the federal courts, and the suggested elimination of some types of jurisdiction, e.g., diversity cases, a limitation on the sweep of jurisdictional claims into local cases might be pertinent for consideration.

(2) The Hobbs Act defendant is quite frequently guilty of other federal violations as to which there is no question. Most frequently it is found for understandable reasons that the amount received has not been reported on income tax returns, thereby presenting a tax evasion case. Also, the Hobbs Act defendant may not have confined himself to one act of extortion but may have engaged in several other such acts as to which there was no question of effect on commerce. This aspect, of course, is not persuasive if the prosecutorial effort is to demonstrate by "throwing the book" that the defendant is guilty of multiple crimes.

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APPENDIX C

OPINION BY JUDGE STEVENS
Judges SWYGERT, PELL and SPRECHER *dissenting*

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 16, 1975

BEFORE

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*

No. 73-1869

United States of America,

Plaintiff-Appellee,

vs.

Casimir Staszcuk,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed In Part And Reversed In Part, in accordance with the opinion of this court filed this date.

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